Supreme Court, U.S.
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No. 00-1115

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

LITTLE SIX, INC. and SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENTS

KURT V. BLUEDOG
BLUEDOG, OLSON
& SMALL P.L.L.P.
5001 West 80th Street
Suite 500
Minneapolis, MN 55437
(952) 893-1813

MARY J. STREITZ
Counsel of Record
MICHAEL J. WAHOSKE
DORSEY & WHITNEY LLP
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

Attorneys for Respondents

165330

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(d), provides Indian tribal governments with the same exemption from the wagering excise and occupational taxes imposed in Chapter 35 of the Internal Revenue Code as is provided in Chapter 35 to state governments.

STATEMENT PURSUANT TO RULE 29.6

Respondent Little Six, Inc. is an arm and instrumentality of the Shakopee Mdewakanton Sioux (Dakota) Community, a federally recognized Indian tribal government. Thus, Little Six is a governmental corporation. It has no parent company, and no publicly held company owns ten percent or more of its stock.

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STATEMENT

Respondent Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian tribal government. Respondent Little Six, Inc. is an arm and instrumentality of the Community established to operate the Community's gaming operations, conducted under the Community's powers of self-government and under authority of federal law to raise revenues for the tribal government. The Community and Little Six are sometimes referred to collectively as the "Community."

As state governments did with state lotteries, Indian tribal governments began to conduct bingo, pull-tab games, and other gaming on reservation and trust lands in the late 1970s and early 1980s to raise critically-needed revenues and provide jobs for their tribal communities. S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3072-73 ("IGRA Report"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987). The Community commenced its pull-tab games in 1982. From its beginnings, Indian gaming has been conducted with encouragement, financial support, and regulatory oversight from the federal government. *Cabazon*, 480 U.S. at 217-18.

In the fall of 1988, Congress enacted the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1988), *codified as amended at* 25 U.S.C. § 2701, *et seq.* (1994 & Supp. 1997) ("IGRA"), to foster the tribal governments' revenue-raising efforts:

> [B]ingo revenues have enabled tribes, like lotteries and other games have done for State and

> local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. . . . [F]or those tribes that have entered into [gaming operations], the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.
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> * * *
>
> The Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services.

IGRA Report at 2-3, 12. IGRA's stated central purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . . ," 25 U.S.C. § 2702(1), three longstanding goals of federal Indian law.

At issue in this case is the applicability to pull-tab games and other lotteries conducted by Indian tribal governments and their instrumentalities of the 0.25% excise tax and the related $50 annual occupational tax imposed under Sections 4401(a)(1) and 4411 in Chapter 35 of the Internal Revenue Code (the "Code").[1] Section 4401(a)(1) imposing the 0.25% excise tax was enacted in a 1982 amendment to Chapter 35. That section taxes only "wagers authorized under the law

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1. The $50 annual occupational tax imposed under Section 4411 applies to tribal governments only if the 0.25% excise tax so applies.

of the State in which accepted." Indian gaming is federally-authorized gaming, not state-authorized gaming, and it is apparent that Congress did not have Indian gaming in mind when it enacted the tax. Indeed, Senators Cannon and Laxalt of Nevada, the original sponsors of the legislation, informed the Senate that the only gaming operations to which the federal wagering taxes applied, other than illegal operations, were conducted by private, *nongovernmental* operators in Nevada. 127 Cong. Rec. S2270 (Feb. 17, 1981).

Congress specifically addressed the applicability of the Chapter 35 taxes to tribal governments in enacting IGRA in 1988. Section 2719(d) of IGRA, discussed more fully below, specifically includes Chapter 35 among the Code provisions which "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." Section 4402(3) in Chapter 35 provides an exemption from the Chapter 35 taxes for wagers placed in state-conducted lotteries.

This case began in a general tax audit of the Community commenced by the Internal Revenue Service (the "IRS") in 1991, nine years after enactment of Section 4401(a)(1) of the Code and three years after enactment of Section 2719(d) of IGRA. In the audit of the Community and in a concurrent audit of another tribal government, the IRS examining agents made the novel proposal to impose the Chapter 35 taxes on the tribal governments' pull-tab games. As soon as the IRS agents made this proposal, Senator Daniel Inouye, the Chairman at that time of the Senate Select Committee on Indian Affairs, the primary author of IGRA, and the recognized leader in Congress on matters of federal Indian law, wrote a letter to IRS Commissioner Fred Goldberg on December 12, 1991, explaining that Congress intended in

Section 2719(d) that tribal governments would be treated the same as the states for purposes of Chapter 35 of the Code.

On April 2, 1992, the IRS National Office issued Technical Advice Memorandum 9229005 (the "TAM") adopting the IRS examining agents' proposal. The TAM constituted the first public statement of the IRS position that Indian tribal governments and their instrumentalities are subject to the federal wagering taxes, even though the tribes had by then been conducting pull-tab games to raise government revenues for ten or more years. Shortly after issuance of the TAM, the Community paid under protest wagering taxes and interest totaling $174,289.39 for tax periods from January 1, 1986, through June 30, 1992, then filed administrative claims for refund of this amount, plus statutory interest. After the IRS disallowed the refund claims, the Community filed this refund action in the Court of Federal Claims, where the court ruled in favor of the United States on the parties' cross-motions for summary judgment.

A unanimous panel of the Federal Circuit reversed the Court of Federal Claims, concluding that the Chapter 35 taxes do not apply to tribally-conducted pull-tab games.[2] The court grounded its decision on Section 2719(d) of IGRA, which provides (with emphasis supplied by the court):

> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, *and chapter 35 of such Code*) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming*

2. The opinion was authored by Judge Lourie and joined by Chief Judge Mayer and Judge Schall.

> *operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations*.
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

Pet. App. at 7a. The court concluded that, because Chapter 35 provides an exemption for state lotteries (in its Section 4402(3)) and is one of the specific Code provisions which Section 2719(d) explicitly provides "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations," Section 2719(d) should be construed to provide an exemption for pull-tab games and other lotteries conducted by Indian tribes. *Id.*

The United States had contended that Section 2719(d) only involves provisions concerning the reporting and withholding of taxes with respect to winnings. The court of appeals, however, recognized the inconsistency between Section 2719(d)'s reference to "provisions . . . concerning the reporting and withholding of taxes [from] winnings" and its explicit references to Section 6050I and Chapter 35, which do not relate to winnings. Pet. App. at 8a.[3] Based on the

3. Chapter 35 taxes only the operator of the gaming facility, not the players, and the tax is based on gross wagers, not winnings. Section 6050I requires a gaming operator to report cash receipts of $10,000 or more. It does not require reporting of cash payments to players, and therefore is also unrelated to "winnings."

statutory language alone, the court found the Community's construction more reasonable than the United States's construction, *id.*, because the Community's construction gives effect and meaning to all of the statute's terms, whereas the United States's construction would render the explicit references in the statute to Section 6050I and Chapter 35 superfluous, a result that a court must attempt to avoid under well-established principles of statutory construction. *E.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995); *see* Pet. App. at 8a.

The court of appeals also relied on legislative history. One of the primary purposes of IGRA, the court noted, is to promote tribal economic development and self-sufficiency. 25 U.S.C. § 2702; *see* Pet. App. 10a. Accordingly, the court found that equal treatment of tribes and states with respect to exemptions from federal wagering taxes is consistent with Congress's intent and with the statute's concept of co-equal sovereignty for the tribes and states. IGRA Report at 13 (discussing co-equal sovereignty); *see* Pet. App. 10a.

In addition, the court relied on the Indian canon of statutory construction, Pet. App. 8a-10a, which has been applied in numerous decisions of this Court from *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), through *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). The Indian canon requires generally that statutes enacted to benefit Indian tribes or Indians must be construed liberally, with ambiguities resolved in favor of the Indians. In the federal tax area, the canon requires specifically that statutes or treaties that contain language that can reasonably be construed to confer a federal tax exemption for Indian

tribes or Indians should be so construed in their favor. *Capoeman*, 351 U.S. at 6-7; *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir.), *cert. denied*, 519 U.S. 932 (1996); *Kirschling v. United States*, 746 F.2d 512, 515 (9th Cir. 1984); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967).

The Federal Circuit denied the United States's petition for rehearing en banc on October 12, 2000.[4]

On January 22, 2001, this Court granted certiorari in *The Chickasaw Nation, et al. v. United States*, No. 00-507, presenting a ~~similar question regarding~~ Section 2719(d) as is presented in this case. In *Chickasaw Nation*, however, the Chickasaw and Choctaw Nations had pursued different theories in urging the United States Court of Appeals for the Tenth Circuit that the federal wagering taxes do not apply to tribal governments, and the Tenth Circuit ruled against the Nations. *The Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000); *Choctaw Nation of Oklahoma v. United States*, 210 F.3d 389 (10th Cir. 2000). When this Court's review was sought, the Community filed an *amicus curiae* brief, urging the Court not to grant certiorari, citing three principal reasons: (1) the Tenth Circuit did not address the Indian law canon question with respect to Section 2719(d) that was presented in the Nations' petition, and the Nations had not raised any aspect of the Section 2719(d) exemption question in either of the lower courts; (2) the conflict in outcomes between the Tenth Circuit in *Chickasaw Nation* and the Federal Circuit in the present case was tolerable because the Federal Circuit, a court of nationwide jurisdiction,

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4. Three of the court's twelve active judges dissented from the denial of rehearing.

had reached the correct result, and the overwhelming majority of affected tribal governments that had not chosen a forum for litigating their claims would choose to proceed in the Federal Circuit; and (3) when viewed from the perspective of federal revenue, the case should not be regarded as sufficiently important to warrant this Court's attention, because the taxes at issue raise extremely minor revenues, their imposition on tribal governments was only an afterthought of the IRS arrived at over ten years after the tribes had begun to conduct pull-tab games, and Congress could amend the statute if it was concerned about the Federal Circuit's interpretation.

Because certiorari was granted in *Chickasaw Nation*, however, the Community now respectfully requests that the Court grant certiorari in the present case as well and consolidate this case with *Chickasaw Nation* for briefing and oral argument.

REASONS FOR GRANTING THE PETITION

1. This case and *Chickasaw Nation* have arrived at the Court at practically the same time after panel decisions occurring nineteen days apart.

2. While the two cases have arrived here close together in time, they came up through the lower courts in appreciably different postures:

(a) The Community chose to litigate in the Federal Circuit, and expended significant resources doing so, in part so that, if successful, a nationwide precedent would be established benefiting tribal governments everywhere.[5] To that end, the

5. The Community was willing to expend significant resources to litigate the question of the applicability of the tax for the benefit of the numerous tribal governments around the country that are substantially burdened by the tax and that lack sufficient resources to litigate the question for themselves.

Community timely raised the issue of whether Section 2719(d) provides the tribal governments with the same exemption from federal wagering taxes provided to the states, and thoroughly briefed and argued the issue. The Federal Circuit directly addressed it, applying well-established rules of statutory construction requiring an examination of the statute's language, structure, purpose, and history, *and* application of the Indian canon of construction. Although the United States attempted to harmonize Section 2719(d)'s reference to "Chapter 35" with the "winnings" language, even Judge Dyk's dissenting opinion from the denial of rehearing conceded "there is no way to reconcile" these references in the statute. Pet. App. at 22a. The United States also relied on an isolated change in the original bill language, removal of the word "taxation," to support its position regarding Section 2719(d), omitting to mention another change in language and other legislative history that supports the Federal Circuit's holding.[6] Even Judge Dyk went no farther in dissent than to conclude that the "legislative history here provides no clear guidance" regarding the meaning of Section 2719(d). Pet. App. at 26a. Under these circumstances, the Federal Circuit properly relied on the Indian canon of statutory construction as well as the statute's language, structure, purpose, and history to reach its holding regarding congressional intent.

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6. Most important in this history, Congress deliberately added "Chapter 35" to Section 2719(d) at the same time that "taxation" was removed. *Compare* 25 U.S.C. § 2719(d) *with* S. 555, 100th Cong., 1st Sess. (1987). This supports the Federal Circuit's holding, because "Chapter 35" and "taxation" had been used interchangeably during the legislative process. *See* H.R. Rep. No. 488, 99th Cong., 2d Sess. 12 (1986) (equating original "taxation" language and "Chapter 35").

(b) As explained more fully in the *amicus curiae* brief filed in opposition to certiorari in *Chickasaw Nation*, the Nations did *not* raise the Section 2719(d) exemption question in their case. Rather, they pursued entirely different theories and lost their case in the Tenth Circuit.[7]

3. When the Nations did raise the Section 2719(d) exemption question in their petition to this Court in *Chickasaw Nation*, the Nations stated their argument in terms of "[w]hether, under the applicable Indian-law canons of construction," Section 2719(d) of IGRA confers on Indian tribes the same exemption from wagering taxes that is afforded to states under Chapter 35 of the Code. *Petition for a Writ of Certiorari* at i, 14, filed in *Chickasaw Nation*. The Community's argument, however, is that in addition to the Indian canon of construction, the statute's language, structure, purpose, and legislative history all are of critical importance in determining whether Section 2719(d) provides this exemption to the tribes. As the Federal Circuit held in the instant case, Pet. App. at 6a-10a, *all* of these matters — language, structure, purpose, history, *and* the Indian canon — must be fully considered to arrive at the proper outcome in this case.

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7. *See Brief Amicus Curiae of Shakopee Mdewakanton Sioux (Dakota) Community and Little Six, Inc. In Support of Denial of Certiorari*, filed in *Chickasaw Nation*. In their objection to the filing of that *amicus curiae* brief, the Nations contended that they did raise the Section 2719(d) exemption question, but they cited only their passing reference in their brief and appendix to Senator Inouye's letter to Commissioner Goldberg, which bore no relationship whatsoever to the legal arguments they made in either of the lower courts.

4. Under these circumstances, the Community is concerned that the parties in *Chickasaw Nation* will not bring to the attention of this Court all of the arguments in favor of exemption that prevailed in the Federal Circuit, for the benefit of tribal governments nationwide. Moreover, this case is unlike other cases that the Court might hold simply because the *issues* are the same as those presented in a case pending on the Court's argument docket, where neither party in the held case would be present. In the instant case, the Community's adversary is participating as a *party* to *Chickasaw Nation*. The United States, as a party in that case, will no doubt attack the reasoning of the Federal Circuit in this case. The Community believes that it would greatly benefit the Court to have the Community be able fully to defend that reasoning before this Court as a party as well.[8]

5. The Nations and the United States will not be prejudiced by consolidation of these cases. In their petition for a writ of certiorari in *Chickasaw Nation*, the Nations stated:

> [We] respectfully submit that the best course of action would be for this Court to grant the Writ in this case, grant the likely-sought Writ when

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8. Ordinarily, the United States would be expected to defend in this Court a lower court decision protecting tribal interests, consistent with the United States's trust responsibility to the Indian tribes. As this Court has stated, the United States "has charged itself with moral obligations of the highest responsibility and trust . . . in dealings with the Indians." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The United States has a conflict of interest in these cases, however, and the Community believes that the United States has fallen far short of its trust responsibility in litigating the Section 2719(d) issue against the tribal governments.

> *Little Six* is finalized . . . and determine the cases together on the merits to resolve their jointly presented issue. . . .

Petition for a Writ of Certiorari at 13-14, filed in *Chickasaw Nation*. Similarly, in its petition in this case, the United States has asked the Court to grant certiorari, in the event that the case is not held. Pet. at 7.

6. Inasmuch as oral argument in *Chickasaw Nation* will not take place until the Court's 2001 October Term, there is ample time to adjust briefing schedules to ensure an efficient presentation of all the issues if consolidation is granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and this case should be consolidated with *Chickasaw Nation* for briefing and argument, or for consolidated argument after separate briefing, as the Court may order.

Respectfully submitted,

KURT V. BLUEDOG
BLUEDOG, OLSON
& SMALL P.L.L.P.
5001 West 80th Street
Suite 500
Minneapolis, MN 55437
(952) 893-1813

MARY J. STREITZ
Counsel of Record
MICHAEL J. WAHOSKE
DORSEY & WHITNEY LLP
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

Attorneys for Respondents